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# Some Reasons Why the Code States Should Adopt the Uniform Sales Act.

(CONTINUED FROM JULY ISSUE)

A STEP TOWARD UNIFORMITY WITH THE LAWS OF OTHER STATES.

**A** *GREEMENT with the greatest weight of authority.*—It has already be briefly indicated<sup>45</sup> how our law is defective from lack of uniformity with the laws of other states. The remedy proposed is to adopt the Uniform Sales Act. The Act has already been adopted in a considerable number of states.<sup>46</sup> Complete uniformity with the laws of all other states by this simple means is as yet unattainable, the Act not yet having been everywhere adopted. It has been adopted already, however, in a sufficient number of states to constitute the largest mass of authorities in agreement on the questions dealt with to be found in the country. The states which have adopted it now have the same rules of law on the questions involved. On those questions many other states have each some local law. On the whole, that law often agrees with the rules in the Uniform Sales Act,<sup>47</sup> but it is not always the same on all points.<sup>48</sup> Moreover, the laws of the states which have not adopted the Uniform Sales Act, where they differ from the rules in that Act, may differ diversely in the different states.<sup>49</sup> If the law of a particular state

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<sup>45</sup> See Adoption of Uniform Sales Act, 5 California Law Review, 400.

<sup>46</sup> To the list given at p. 404 of the previous article should be added Minnesota and Utah, where the Act was also finally passed in the spring of 1917, making a total of eighteen jurisdictions in all.

<sup>47</sup> The Uniform Sales Act being a careful codification of the common law generally prevailing, the rules of law therein expressed accord with much actual case law in the various states throughout the country.

<sup>48</sup> In regard to the questions on which there is much division of authority, the local law may not always be same as that expressed in the Act.

<sup>49</sup> A ready example is afforded by the different view adopted in different jurisdictions as to whether title passes when the price of the goods yet remains to be determined by some further act, such as weighing or measuring. In some states it is held that there is a presumption in such cases that title was not intended to pass, even when the weighing or measuring was to be done by the buyer. See *McFadden v. Henderson* (1901), 128 Ala. 221, 29 So. 640; *Pinkham et al. v. Appleton* (1890), 82 Me. 570, 20 Atl. 237. In other states it is held that there is such a presumption only if what remains to be done is to be done by the seller. See

is not in accord with the Uniform Sales Act, it does not follow therefore that its position is supported by the law of the other states which have not adopted the Act. Many of them may agree with the rule in the Uniform Sales Act on that particular point, while those that disagree scatter in several directions. Adoption of the Uniform Sales Act in the Code States would therefore place our law, to that extent, in accord with the largest unified body of law on the subject prevailing at the present time in the country.

*Increase of uniformity everywhere.*—It should not be forgotten, moreover, that the adoption of the Uniform Sales Act is in this respect more than a local matter. Inconveniences to us arise from differences between our law and the laws of other states.<sup>50</sup> As a step toward removing those inconveniences, let it be assumed that we adopt the Act. By adopting the Act we not only remove our own inconveniences in that respect, but also remove, in so far, the inconveniences of those with whom we deal in other states. All have suffered from the inconveniences arising from the same cause, lack of uniformity. If that cause is removed, it relieves everyone concerned, and enables business with others to be carried on more satisfactorily in every way. By removing the lack of uniformity here, therefore, we not only improve our own law in this respect, but contribute a part toward improving the law of every other state, and reap

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Hagins v. Combs (1897), 102 Ky. 165, 43 S. W. 222; Day v. Gravel (1898), 72 Minn. 159, 75 N. W. 1. In many states it has been held that there is such a presumption if the price still remains to be ascertained, the court not adverting particularly to the question of who is to do the weighing or measuring. See Jones v. Pearce (1869), 25 Ark. 545; Commercial Bank v. Gillette (1883), 90 Ind. 268; McClung v. Kelley (1866), 21 Iowa 508; Smart v. Batchelder (1876), 57 N. H. 140; Hamilton v. Gordon (1892), 22 Ore. 557, 30 Pac. 495; Simth v. Evans (1892), 36 S. C. 69, 15 S. E. 344; Gibbs v. Benjamin (1872), 45 Vt. 124; Pacific Coast Elevator Co. v. Bravinder (1896), 14 Wash. 315, 44 Pac. 544; Bank of Huntington v. Nafier (1895), 41 W. Va. 481, 23 S. E. 800. In still other states it is held that there is no presumption at all as to whether or not title is intended to pass, from the mere fact that weighing or measuring to determine the price still remains to be done. See Lassing v. James (1895), 107 Cal. 348, 40 Pac. 534; Boaz v. Schneider (1887), 69 Tex. 128, 6 S. W. 402. This position was also taken in New York before the Uniform Sales Act was adopted there (Sanger v. Waterbury, [1889] 116 N. Y. 371, 22 N. E. 404; Bayne v. Hard, [1903] 174 N. Y. 534, 66 N. E. 1104), and is the position adopted in the Uniform Sales Act, § 19, now in force in a considerable number of states. As to the authorities on this question at common law, see, further, Williston on Sales, § 269, and Mecham on Sales, §§ 515-532.

<sup>50</sup> See the previous article, p. 407.

the reward of dealing in a more satisfactory way with those with whom we do business throughout the country.

*Uniformity in dealing with precedents.*—A further consideration in regard to the effect of the adoption of the Uniform Sales Act toward bringing about uniformity with the laws of other states may be mentioned. The decisions of the courts of a number of states, on questions arising in regard to sales, are already being rendered under the Uniform Sales Act. Before the Uniform Sales Act is adopted here, can anyone tell what weight to attach to those decisions, as authorities, when they are cited to our courts as against conflicting decisions on similar facts from states where the Act is not in force? If the Uniform Sales Act were adopted, this question could present no difficulty, since the Act itself contains an express provision<sup>51</sup> on the weight to be given to decisions under the Sales Act in other states.<sup>52</sup>

#### A GREATER MEASURE OF CERTAINTY.

Much more important, as a local matter, than securing uniformity with the laws of other states is the question of securing certainty in our local law.<sup>53</sup> The ordinary litigation in our courts is usually between local people in regard to local transactions. For every instance of difficulty on account of lack of uniformity with the laws of other states in regard to sales, there are many instances of difficulty because the local law of sales is too uncertain. It is not here contended that absolute certainty can be attained. All legal history belies any such possibility. As controversies arise and new situations are presented, courts will be needed to apply the law. It is submitted, however, that the adoption of the Uniform Sales Act would definitely settle many unsettled questions in our local law, render it more certain to that extent, and thereby reduce the need of frequent and long continued litigation.

A comparison of the present position of our law with the provisions in the Uniform Sales Act will demonstrate that, in many respects, the prevailing uncertainty may be reduced to

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<sup>51</sup> See Uniform Sales Act, § 74.

<sup>52</sup> As to how § 74 has fared in the courts, see in ensuing article, n. 13, and especially *Commercial National Bank v. Canal-Louisiana Bank & Trust Co.* (1915), 239 U. S. 520, 36 Sup. Ct. Rep. 194.

<sup>53</sup> See the previous article, at p. 408 et seq.

greater certainty. The discussion to follow assumes that it is desirable to have rules of law definite and settled,<sup>54</sup> and is confined to showing the more important particulars in regard to which the Uniform Sales Act is more definite and certain than our present Code. Within the limits of this examination, no attempt can be made to discuss at length the merits of the particular rules of law contained in the Uniform Sales Act where our Code has no rules at all, beyond noting the fact that they are neither new nor startling, being based on common law principles as developed in actual litigation. For extended discussion on the merits of each particular rule embodied in the Uniform Sales Act, the interested reader must be referred to the treatises on the law of sales.<sup>55</sup>

The Uniform Sales Act contains seventy-nine sections. Of these, more than fifty deal with matters in regard to which our present Code is entirely silent. Some thirty deal, in detail, with matters on which the provisions in our Code take a more general and indefinite form, without being inconsistent with the provisions of the Uniform Sales Act. Only a few of the seventy-nine sections of the Act work substantial changes in the law already expressed in our Code. The correctness of these statements may be best demonstrated by attention to each of the sections in turn.

#### SPECIFIC PROVISIONS ON MATTERS IN REGARD TO WHICH OUR CODE IS SILENT.

*Acceptance under statute of frauds.*—Section 4 (subdivisions 2 and 3)<sup>56</sup> codifies the results of much litigation, under the

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<sup>54</sup> See the previous article, at pp. 412-14.

<sup>55</sup> See Mechem on Sales, Burdick on Sales, Tiffany on Sales, and Williston on Sales. The last mentioned, Williston on Sales, is the best adapted work for use in connection with the Uniform Sales Act, since the material is collected and arranged appropriately under each section of the Act.

<sup>56</sup> As reference may be freely made to our Code in the recent editions of the statutes in each of the Code states, no attempt will here be made to reproduce all its language. Similarly, as reference may be made to copies of the Uniform Sales Act, it is unnecessary to waste space by repeating its provisions here, except so far as is necessary for clearness of expression. The references to our Code, in this paper, are for the different Code states as follows: Cal. Civ. Code; Revised Codes of Montana (1907); Compiled Laws of North Dakota (1913); Compiled Laws of South Dakota, vol. (1913). The references to the Uniform Sales Act are to that Act as recommended by the Commissioners and as appearing in Williston's treatise. The text of the Act is also given in the appendices to the latest editions of Burdick on Sales and Tiffany on Sales.

Statute of Frauds, as to what is "goods" and what is a sufficient "acceptance" to satisfy the statute. The Statute of Frauds, as passed in England in 1677, required, among other things, that, for a sale of goods to be enforceable, there must have been acceptance, etc., or a memorandum in writing, if the price was ten pounds or over. Our Code substantially re-enacts the old statute in these respects, though with some variations in the different Code States as to the amount,<sup>57</sup> without affording much assistance as to these questions under it which have led to so much litigation. Some of our local cases<sup>58</sup> have, however, reached a result substantially in accord with the rule in the Uniform Sales Act.

*Partial loss or deterioration.*—Section 7 (subdivision 2) provides a definite rule as to how the rights of the parties are to be adjusted in cases where they have purported to sell specific goods but the goods without the seller's knowledge have partly perished or greatly deteriorated. This situation has led to considerable difficulty at common law<sup>59</sup> and is not provided for in our present Code. Section 8 deals with similar questions involving difficulties where there is a contract to sell specific goods, a situation equally unprovided for in our Code.<sup>60</sup>

*Effect of conditions.*—Section 11 deals with the effect of conditions in a contract to sell or a sale, and distinguishes them from warranties, which, in the proper usage of this term, are promises.<sup>61</sup> This inquiry is untouched in our Code.

*Warranty.*—Section 15 (subdivision 4) contains a well established rule at common law that, in a sale of a known, described and definite article, there is no warranty of fitness for any particular purpose.<sup>62</sup> On this matter our Code is silent.<sup>63</sup> Section

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<sup>57</sup> The amount in the old English statute has in most American states been translated into \$50.00. Such was the amount adopted in North Dakota and South Dakota. In California and Montana, however, the amount has been fixed at \$200.00. By the recent adoption of the Uniform Sales Act in North Dakota, the amount has been changed to \$500.00.

<sup>58</sup> *Jamison v. Simon* (1885), 68 Cal. 17, 8 Pac. 502; *Dauphiny & Co. v. Red Poll Creamery Co.* (1899), 123 Cal. 548, 56 Pac. 451; *Slater Brick Co. v. Shackleton* (1904), 30 Mont. 390, 76 Pac. 805; *Dinnie v. Johnson* (1898), 8 N. D. 153, 77 N. W. 612.

<sup>59</sup> *Williston on Sales*, § 162; *Mechem on Sales*, § 199.

<sup>60</sup> See *Tillson v. United States* (1889), 129 U. S. 101, 32 L. Ed. 636, 9 Sup. Ct. Rep. 255; *Slade v. Lee* (1892), 94 Mich. 127, 53 N. W. 929; *Drews v. Ann River Logging Co.* (1893), 53 Minn. 199, 54 N. W. 1110.

<sup>61</sup> This feature is elaborately explained in *Williston on Sales*, §§ 180-181.

<sup>62</sup> *Pullman's Palace Car Co. v. Metropolitan Street Ry. Co.* (1895), 157 U. S. 94, 39 L. Ed. 632, 15 Sup. Ct. Rep. 503; *Peoria Grape-Sugar Co. v.*

15 (subdivision 5) specifies that a warranty of quality may be annexed by the usage of trade. It would seem that this result would be universally accepted on common law principles of contract, the usage showing what the intention of the parties must have been. Unfortunately, the actual litigation on the question has led to much disagreement.<sup>64</sup> On this question, too, our Code is silent. Section 15 (subdivision 6) settles the question that an express warranty does not exclude an implied warranty unless inconsistent. This is in accord with the better view at common law, there being nothing in the mere fact that a promise in regard to one matter is exacted to indicate that other promises, which would be understood in the ordinary course, are thereby excluded. On this question, however, there is much conflict of authority in the cases<sup>65</sup> and on it, again, our Code is silent.<sup>66</sup> Section 16 (subdivision c) established the wholesome rule that the warranty in a case of a sale by sample implies not merely that the goods are like the sample, but that, where the seller is a dealer in that kind of goods, they are free from defects rendering them unmerchantable which would not be apparent on a reasonable examination of the sample. Common

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Turney (1898), 175 Ill. 631, 51 N. E. 587; *Ehrsam v. Brown* (1907), 76 Kan. 206, 91 Pac. 179; *Franklin Mfg. Co. v. Lamson & Goodnow Mfg. Co.* (1905), 189 Mass. 344, 75 N. E. 624.

<sup>63</sup> Some of our local cases tend in the same direction. See, for example, *Davis v. Iverson* (1894), 5 S. D. 295, 58 N. W. 796; and especially *Bancroft v. San Francisco Tool Co.* (1898), 120 Cal. 228, 52 Pac. 496; *Mannix v. Tryon* (1907), 152 Cal. 31, 91 Pac. 983; *Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co.* (1908), 153 Cal. 725, 96 Pac. 369.

<sup>64</sup> See, for example, *Barnard v. Kellog* (1870), 10 Wall. 383, 19 L. Ed. 987; *Bevine v. Dord* (1851), 5 N. Y. 95, 55 Am. Dec. 321; *Witherill v. Neilson* (1853), 20 Penn. St. 448; *Chicago Package Co. v. Tilton* (1877), 87 Ill. 547; *Sumner v. Tyson* (1850), 20 N. H. 384; *Jones v. Bowden* (1864), 4 Taunt. 847.

<sup>65</sup> *Williston on Sales*, § 239, and *Mechem on Sales*, §§ 1259-1260, cite numerous authorities on each side of this proposition.

<sup>66</sup> In the Code states the cases that have touched on the question have not been in harmony. A dictum in *Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co.* (1908), 153 Cal. 725, 96 Pac. 369, states without reservation that implied warranties are merged in the written contract. In *North Alaska Salmon Co. v. Hobbs, Wall & Co.* (1911), 159 Cal. 380, 120 Pac. 27, however, the view taken in the Uniform Sales Act is followed. Contrary to the view taken in the Uniform Sales Act, without discussion on the merits, is *Sheafe v. Zashow* (1912), 30 S. D. 159, 138 N. W. 16. In Montana no cases apparently have expressly dealt with the question. The North Dakota cases are in accord with the view taken in the Uniform Sales Act. See *Dowagiac Mfg. Co. v. Mahon* (1904), 13 N. D. 516, 101 N. W. 903; *Hooven v. Wirtz* (1906), 15 N. D. 477, 107 N. W. 1078; *Comptograph Co. v. Citizens Bank* (1915), 32 N. D. 59, 155 N. W. 680.

law authorities support this view<sup>67</sup> but on it there is nothing in our Code.

*Rules for ascertaining intention.*—Section 19 contains a number of definite rules for ascertaining the intention of the parties, where there is nothing in the transaction showing it affirmatively, as to whether title is to pass. This is a matter upon which there is an immense amount of conflicting litigation.<sup>68</sup> It is a matter, too, which is of great importance, since, very often, the parties do not think of the particular moment at which they want title to be transferred, but that fact later turns out to be decisive as to their rights when the goods have been lost or deteriorated before the parties have entirely completed their transaction. In such cases, of course, the loss, unless otherwise stipulated, or shifted by the fault of either, must fall upon the one who was owner when the loss occurred. As they did not arrange particularly about the matter beforehand, after the loss occurs each is likely to insist that the other is the owner. The general rule

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<sup>67</sup> *Nusserwanjee Bomanjee Mody v. Gregson* (1868), L. R. 4 Ex. 49; *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438; *Drummond & Sons v. Van Sugen Co.* (1887), L. R. 12 App. Cas. 284; *Bierman v. City Mills Co.* (1897), 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799.

<sup>68</sup> As an example see n. 49, *supra*, on the case law situation in regard to the effect of unascertained price on the passing of title.

Another important example is afforded by the question of the effect of a C. O. D. provision on the passing of title. That the American common law authorities on this question are much in conflict, see *Williston on Sales*, § 345; *Mechem on Sales*, §§ 740, 793, 794, and notes, especially note to *Mechem*, § 740, containing a considerable compilation of authorities. For some further interesting cases on the question, see *Adair v. Commonwealth* (1906), 89 S. W. 1132, and *Cheadle v. Roberts* (1911), 150 Iowa 639, 130 N. W. 368.

The question has been most elaborately litigated in cases of liquor shipments into dry territory. By the ordinary rule of law that title passes on delivery to the carrier, if the shipment is in accordance with the order, the title to the liquor passes when it is shipped by the seller in wet territory. What happens thereafter is then not a violation of the prohibition laws, unless the liquor is re-sold, a fact often hard to prove. Such has been the holding in the majority of states where the question has been litigated, the courts thinking that there was no basis for inferring any other than the ordinary intent as to the passing of title from the mere fact that the goods were marked C. O. D. Such restrictions as to delivery has been held to indicate merely an intent on the part of the seller to insist upon his seller's lien.

The importance of the question, from the standpoint of enforcement or evasion of the prohibition laws, has been considerably diminished by the Federal Statutes. (U. S. Comp. St. 1913, § 10409), which prohibits railway companies, express companies, etc., from collecting on or after delivery in case of liquor shipments over state lines, and makes violations of that prohibition subject to heavy fine. The Federal Statute, however, does not directly touch the question of title to the liquors in the course of such shipments.



is recognized that title passed in a sale if the parties intended that it should; but without affirmative evidence on what that intent was, presumptions must be resorted to. What those presumptions are to be, in different circumstances frequently arising, it is needful to have specified definitely in order to be able to settle such common cases without too much long-continued and expensive litigation. The Uniform Sales Act specifies these presumptions. The cases show much conflict of authority in them and in our Code there is nothing at all.<sup>69</sup>

*Mercantile theory of documents of title.*—Section 20 (subdivisions 2, 3 and 4) and sections 27-40 establish the law of documents of title—i. e., bills of lading and warehouse receipts, in accordance with what is called the “mercantile” theory, as opposed to the “common law” theory of such documents. Both theories have much support in decided cases, though the mercantile theory is probably becoming more firmly established, while the common law theory is waning.<sup>70</sup> By the so-called common law theory of documents of title, the form of the document is prima facie evidence of the title to the goods for which the document was issued. Other circumstances may, however, by this theory, be brought in to contradict the document and show that title to the goods was really elsewhere than in the persons indicated by the document, just as other circumstances than possession may show that title to ordinary chattels is in others than the possessor. Such a process, always permissible when the question is raised only between the original parties, if still permissible after the document has been transferred to a bona fide purchaser, makes such documents unsatisfactory as commercial documents on the faith of which to advance money. To facilitate the use of such documents in the business world, either

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<sup>69</sup> For determining the questions of whether title passed or not, our Code contains merely the general statement that title passes whenever the parties agree upon a present transfer. See Cal. Civ. Code, § 1140; Revised Codes of Montana (1907), § 4632; Compiled Laws of North Dakota (1913), § 5535; Compiled Laws of South Dakota (1913), Civ. Code, § 950. This provision leaves the question open, for it frequently happens that the parties did not advert, at the time, to the particular moment when they intended title to pass.

<sup>70</sup> This is especially true since the mercantile theory was adopted in the Uniform Sales Act, the Warehouse Receipts Act, and the Bills of Lading Act, and these Acts have been adopted in more and more states. At the last reports (June, 1917) the Warehouse Receipts Act had been adopted in forty states, while the Bills of Lading Act had been adopted in twenty-one states, and had also been adopted by the Federal Congress.

for use as security for advances while the goods are in transit or storage, or for ready sale of such goods in the interim by a negotiation of the document, the document itself must be more conclusive. By the mercantile theory of documents of title, adopted in many courts, the form of the document is conclusive and transferees may take it, relying on the showing it presents as to who is the owner. By this means, a great deal of business can be done without the necessity of tying up the amount of capital represented by the value of the goods shipped or stored during the period of transit or storage. The considerations applying here for making these documents more negotiable are thus analogous to those applying in the case of ordinary commercial paper—i. e., bills, notes, and checks. The mercantile theory of documents of title is adopted also in the Uniform Warehouse Receipts Act, which has now (1917) been enacted into law in all four of the Code States. The corresponding sections of the Uniform Sales Act would, therefore, so far as warehouse receipts are concerned, work no change. The effect upon the law of bills of lading would be to clarify what is probably in our Code already but is inconclusive, owing to the general language of the Code provisions and the strict construction identical language has elsewhere received. While our Code has purported to make such documents negotiable,<sup>71</sup> the language is very general and is like similar language in statutes of many other states which have been so narrowly construed that their effect is to leave the documents transferable, as under the common law theory, but not negotiable in the sense of protecting a transferee for value without notice beyond the protection extended in a similar transfer of ordinary chattels.<sup>72</sup> Our local law on the subject, if without decided cases in point, is therefore inconclusive.<sup>73</sup> In order to establish the negotiability of such docu-

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<sup>71</sup> Cal. Civ. Code, §§ 2127-28; Revised Codes of Montana (1907), §§ 6210-11; Compiled Laws of South Dakota (1913), Civ. Code, §§ 1552-53.

<sup>72</sup> *Shaw v. Railroad Co.* (1879), 101 U. S. 557, 25 L. Ed. 892; *Barnum Grain Co. v. Great Northern Ry. Co.* (1907), 102 Minn. 147, 112 N. W. 1030, 1049; *Commercial Bank v. Hart* (1892), 99 Ala. 130, 12 So. 568; *Turner v. Israel* (1897), 64 Ark. 244, 41 S. W. 806; *Garwood v. Haffy* (1897), 18 Wash. 246, 51 Pac. 461; *Hale v. Milwaukee Dock Co.* (1872), 29 Wis. 482. In a few cases a wider construction of such statutes has been given. See *Hardie v. Vicksburg Ry. Co.* (1903), 118 La. 254, 42 So. 793; *Tiedeman v. Knox* (1880), 53 Md. 612.

<sup>73</sup> This seems to be the case, apart from the Uniform Acts, in Montana, North Dakota, and South Dakota. In California the cases seem to have held that a bill of lading is not negotiable, but have not directly dealt

ments of title in accordance with the mercantile theory, to make it safe to advance money on such bills of lading either for purchase or loan on security, we need the specific provisions carrying this doctrine into effect which are contained in the Uniform Sales Act.<sup>74</sup>

*Auctions.*—Section 21 (subdivision 1) states, in statutory form, what is abundantly clear on principle and authority,<sup>75</sup> that where goods are put up for sale by auction, in lots, each lot is the subject of a separate contract of sale. On this point our Code is silent.

*Sale by a person not the owner.*—Section 23 (subdivision 1) states the fundamental doctrine of the law of property that no one can give what he has not. This doctrine, assumed but nowhere expressly stated in our code,<sup>76</sup> is recognized in some of our cases.<sup>77</sup>

*Sufficiency of delivery.*—Section 43 (subdivision 3) provides a definite rule as to what is to be regarded as sufficient delivery in case of sale of goods in the possession of third parties, a question which has caused considerable confusion.<sup>78</sup>

*Delivery of wrong quantity.*—Section 44 provides definite rules as to how the obligations of sellers and buyers are effected by delivery of a wrong quantity of goods. Definite rules, ascertainable in advance of litigation, to enable parties to adjust their

with the effect of this local statute in that regard. See *Tineker v. Ayeshford* (1850), 1 Cal. 76, 79; *Dodge v. Meyer* (1882), 61 Cal. 405; *Cavellero v. Texas & Pac. Ry. Co.* (1895), 110 Cal. 348, 42 Pac. 918.

<sup>74</sup> For detailed examination of the merits of each of the sections of the Uniform Sales Act bearing on the mercantile theory of documents of title and the authorities involved in regard to each, see *Williston on Sales*, §§ 405-444.

<sup>75</sup> See *Emmerson v. Heelis* (1809), 2 Taunt. 38; *Wells v. Day* (1878), 124 Mass. 38; *McManus v. Gregory* (1888), 94 Mo. 370, 7 S. W. 423. See further the discussion of this question in *Williston on Sales*, § 295.

<sup>76</sup> Cal. Civ. Code, § 1083; Revised Codes of Montana (1907), § 4609; Compiled Laws of North Dakota (1913), § 5508; Compiled Laws of South Dakota (1913), Civ. Code, § 935.

<sup>77</sup> See *Alexander v. Jackson* (1891), 92 Cal. 514, 28 Pac. 593, 27 Am. St. Rep. 158; *Rosenbaum v. Foss* (1895), 7 S. D. 83, 63 N. W. 538. A similar trend, but without such specific averment, may be frequently observed in other cases also, as for example in *Curtin v. Kowalsky* (1904), 145 Cal. 432, 78 Pac. 962; *Eise v. Merchant's National Bank* (1887), 4 Dak. 405, 33 N. W. 897; *North Dakota Cattle Co. v. Serumgard* (1908), 17 N. D. 466, 117 N. W. 453; *Parker v. Randolph* (1894), 5 S. D. 549, 59 N. W. 722.

<sup>78</sup> See the discussion and authorities cited in *Williston on Sales*, § 454. On this point the California cases seem to have reached a position substantially in accord with the Uniform Sales Act. See *Ghirardelli v. McDermott* (1863), 22 Cal. 539; *Schurtz v. Romer* (1890), 82 Cal. 474, 23 Pac. 118.

dealings and controversies are in this particular very important, since it often happens that the amounts delivered or tendered do not tally exactly with the amounts bargained for, and it is the uncertainty as to the legal effect of such discrepancies that leads to controversy and often leads to long-continued and expensive litigation. On this again, our Code is entirely silent.<sup>79</sup>

*Delivery in installments.*—Section 45 provides, in statutory form, a rule, applying generally to contracts, for the effect of delivery in installments. As the question is one involving the construction of the contract the parties have made, the general rules stated are likely not to do away entirely with disputes as to their application.<sup>80</sup> Even granting that, however, it is better to have a rule for disposing of such cases than to have to find a rule only at the end of a long course of litigation, as is now necessary, for our Code is entirely silent on the question of delivery in installments under a contract to sell or a sale.<sup>81</sup>

*Right of inspection.*—Section 47 (subdivision 3) establishes that, where the carrier is to collect on delivery of the goods, the buyer has no right of inspection until after he has paid. This provision is in accord with decided cases<sup>82</sup> but we have nothing on the point in our local law.

*What constitutes acceptance.*—Section 48 defines what constitutes acceptance of goods under a contract of sale, as intimation of acceptance, exercising acts of ownership, or retaining the goods. The inquiry whether the buyer has accepted the goods often becomes material, both under the Statute of Frauds, as a satisfaction of the statute, and under any inquiry whether the contract has been performed. It is therefore desirable to have the law settled in regard to what amounts to acceptance of the goods under the contract of sale. Here, again, our Code,

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<sup>79</sup> California cases again substantially accord with the rule in the Uniform Sales Act. See *Willamette Co. v. Union Lumber Co.* (1892), 94 Cal. 156, 29 Pac. 773; *Ontario Ass'n v. Cutting Packing Co.* (1901), 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231; *Inman v. White Lumber Co.* (1901), 14 Cal. App. 551, 112 Pac. 560; *Fleming v. Law* (1915), 28 Cal. App. 110, 151 Pac. 385. In the other three Code states the particular questions seem not yet to have reached the Supreme Courts for decision.

<sup>80</sup> For some litigation under these rules see n. 13 in later article.

<sup>81</sup> The result reached in *Wood, Curtis & Co. v. Scurich* (1907), 5 Cal. App. 252, 90 Pac. 51, accords with this provision of the Uniform Sales Act.

<sup>82</sup> *Wilste v. Barnes* (1877), 46 Iowa 210. For a considerable list of citations on this general question see 10 C. J. 279-280.

is silent,<sup>83</sup> but the Uniform Sales Act contains a definite rule which may be ascertained in advance of litigation.

*Acceptance as related to action for damages.*—Section 49 provides that acceptance of the goods does not bar action for damages if the goods do not correspond with the requirements of the contract. It thereby settles a question which is involved in much conflict of authority at common law. Several cases in the Code States are in accord with the view adopted in the Uniform Sales Act.<sup>84</sup>

*Wrong delivery.*—Section 50 expresses a well-settled rule at common law, that the buyer is not bound to return goods wrongly delivered.<sup>85</sup> Our Code, however, is silent on the question. Similar remark may be made on Section 51, covering the buyer's liability for failure to accept delivery.<sup>86</sup>

*Definition of unpaid seller.*—Section 52, a definition of unpaid seller, is new to our Code. It is defined in the Uniform Sales Act for the sake of accuracy in dealing with the subsequent sections giving the remedies of an unpaid seller.

*Lien after part delivery.*—Section 55, providing for the unpaid seller's lien after part delivery, covers an important matter in regard to which the Code is silent.

*When lien is lost.*—Section 56, providing how the unpaid seller may lose his lien, by delivery, waiver, etc., is also a specific provision in accordance with common law principles and authority on matter in regard to which our Code is entirely silent.

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<sup>83</sup> On this point California cases accord with the position taken in the Uniform Sales Act. See *Walden v. Murdock* (1863), 23 Cal. 540, 83 Am. Dec. 435; *Coneigo v. Lynch* (1884), 65 Cal. 273, 3 Pac. 889; *Merehin v. Ball* (1885), 68 Cal. 205, 8 Pac. 886; *Jackson v. Porter Land Co.* (1907), 151 Cal. 32, 90 Pac. 122; *Sherman v. Ayres* (1912), 20 Cal. App. 733, 130 Pac. 163; *United Motor Co. v. Callander* (1916), 30 Cal. App. 41, 157 Pac. 561.

<sup>84</sup> See *Wheelock v. Pacific Pneumatic Car Co.* (1876), 51 Cal. 223; *Browning v. McNear* (1904), 145 Cal. 272, 78 Pac. 722; *Jackson v. Porter Land Co.*, *supra*, n. 83; *Jackson Machine Works v. Duff* (1910), 158 Cal. 47, 109 Pac. 616; *Hillman v. Luzon Cafe Co.* (1914), 49 Mont. 180, 142 Pac. 641; *Northwestern Cordage Co. v. Wright* (1896), 5 N. D. 432, 67 N. W. 298; *International Society v. Hildreth* (1902), 11 N. D. 262, 91 N. W. 70.

<sup>85</sup> See, for example, *Alden v. Hart* (1894), 161 Mass. 576, 37 N. E. 742; *Doane v. Dunham* (1872), 65 Ill. 512; *Mulcahey v. Diendonno* (1908), 103 Minn. 176, 115 N. W. 636.

<sup>86</sup> On this point California cases accord with the Uniform Sales Act. See *Blanchard v. Pac. Rolling-Mill Co.* (1894), 4 Cal. Unrep. 619, 36 Pac. 584; *Gay v. Dare* (1894), 103 Cal. 454, 37 Pac. 466.

*When goods are in transit.*—Section 58, defining in detail when goods are held to be in transit for the purposes of the law of stoppage in transit, is very much more complete than our Code, for it is based on decided cases<sup>87</sup> involving various circumstances not dealt with in our Code at all.

*No right to stop against transferee of documents for value without notice.*—Section 59 (subdivision 2) and Section 62 affirmatively provide for the protection of a bona fide transferee of an order bill of lading after an unpaid seller's notice to the carrier to stop the goods. This is in accord with the mercantile doctrine of bills of lading, already set out in sections 27-40. On this question, our present Code contains nothing definite. In California, the cases have already reached the position now embodied in the Uniform Sales Act.<sup>88</sup>

*Effect of sales of goods subject to lien or stoppage in transit.*—Section 62, in providing that a sale of the goods by the buyer while they are in transit shall not cut off the seller's right to stop them, is stating a generally accepted rule<sup>89</sup> about which our Code is silent. The last part of the section, protecting the transferee of an order bill of lading under such circumstances, while involved in some conflict of authority at common law,<sup>90</sup> expresses the view already reached in California cases, which is correct on principle, in accordance with the mercantile theory of bills of lading adopted in the Uniform Sales Act.

*Action for the price.*—Section 63 (subdivision 2) expresses what is undoubted common law,<sup>91</sup> though our Code is silent on the subject, that if the contract makes the price payable on a certain day, irrespective of transfer of title or delivery, the seller may recover the price, according to the terms of the contract,

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<sup>87</sup> See the extended discussion and numerous authorities cited in Williston on Sales, §§ 523-539.

<sup>88</sup> Newhall v. Central Pacific R. R. Co. (1876), 51 Cal. 345, 21 Am. Rep. 713.

<sup>89</sup> See, for example, Keeler v. Goodwin, 111 Mass. 490; Anderson v. Read (1887), 106 N. Y. 333, 13 N. E. 292.

<sup>90</sup> On this question California has held that the transferee is to prevail. See Newhall v. Central Pacific R. R. Co., *supra*, n. 88. This view, correct on principle, is opposed by the weight of authority. See Williston on Sales, § 542; Mechem on Sales, § 1567; Burdick on Sales, p. 236, and authorities cited. The best discussion on principle is found in Williston, sustaining the California case and taking issue with Burdick and Mechem who approve the weight of authority.

<sup>91</sup> See, for example, White v. Solomon (1895), 164 Mass. 516, 42 N. E. 104.

unless he manifests inability to perform or shows an intention not to perform. Such contracts are rare, apart from contracts of conditional sale, which are well known and constantly enforced by the courts.<sup>92</sup>

*Remedies for breach of warranty.*—Section 69 specifies far more completely than our Code the buyer's remedies for the seller's breach of warranty. Yet with the exception of one subdivision, (1) (d), it is consistent with the general provisions found in our Code.<sup>93</sup> In parts, it goes into much detail in regard to features as to which the present Code is entirely silent, as in subdivisions (3), (4), and (5). In regard to subdivision (1) (d), which works a change in the Code, see below.<sup>94</sup>

*Effect of Uniform Sales Act on right to recover interest and special damages.*—Section 70 contains the provisions that the enactment of the Uniform Sales Act shall not affect the right to recover interest or special damages in any case where by law they may be recoverable. This is to guard against any undesigned change in other parts of the law as a consequence of the enactment of the Uniform Sales Act.

*Interpretation.*—Section 71-73 contain various rules of interpretation of the Act itself, quite in accord with accepted principles. Section 75 provides that the provisions of the Uniform Sales Act are not, unless so stated, applicable to mortgages. It was thought best not to attempt to deal with the peculiar rules of mortgage law, as such, in connection with the Uniform Sales Act, but to leave them to be dealt with, if so desired, by independent legislation. Section 74 provides that the Uniform Sales Act is to be so interpreted as to give effect to the purpose of uniformity. This principle is indispensable if the purpose of uni-

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<sup>92</sup> Conditional sales are recognized as a matter of course in the Code States as they are in other states generally. See, for example, *Parke and Lacy Co. v. White River Lumber Co.* (1894), 101 Cal. 37, 35 Pac. 442; *Van Allen v. Francis* (1899), 123 Cal. 474, 56 Pac. 339; *Rock Island Plow Co. v. Western Implement Co.* (1911), 21 N. D. 608, 132 N. W. 351; *Goodale v. Wallace* (1905), 19 S. D. 405, 103 N. W. 651.

It is proper here to notice that the Uniform Sales Act does not attempt to deal generally with the many intricate and difficult questions arising upon conditional sales. The whole subject of conditional sales is to be dealt with by the Commissioners on Uniform State Laws in a proposed Uniform Conditional Sales Act, which is now in preparation.

<sup>93</sup> See Cal. Civ. Code, §§ 3312-14; Revised Codes of Montana, §§ 6060-62; Compiled Laws of North Dakota, §§ 7157-59; Compiled Laws of South Dakota, Civ. Code, §§ 2304-06.

<sup>94</sup> See later article, "Changes in our Present Code, . . . The Law of Warranty."

formity is to be consistently carried out,<sup>95</sup> and has already won recognition from several courts, including the Supreme Court of the United States.<sup>96</sup> Section 76 provides a list of definitions of terms used in the Act itself. In this respect the Uniform Sales Act follows the example set in the National Bankruptcy Act, in the Negotiable Instruments Law, and in other statutes, defining its own terms, so far as possible, to prevent confusion as to what they mean. In regard to these definitions in the Uniform Sales Act, little or no question has been raised, except in the case of the definition of "value", the effect of which is considered below.<sup>97</sup>

PROVISIONS MAKING MORE SPECIFIC VARIOUS MATTERS  
ALREADY CONTAINED IN OUR CODE.

Lack of adequate space in an article of the present character does not permit any detailed discussion of the merits of these provisions. For such discussion, the reader is referred to the treatise.<sup>98</sup> The Uniform Sales Act, in dealing with them, is better, since its provisions are more specific, are more easily applied and are more successful in avoiding litigation.

What the provisions are which substantially correspond may best be indicated by bringing them together in parallel columns. Where the provisions of the Uniform Sales Act not only make more specific what is already expressed in general terms in our Code, but also set out rules of law on matters in regard to which our Code is silent, they have in the main been already dealt with above. Where they produce or are likely to be alleged to produce affirmative changes in our law, they are dealt with below. The following presentation of corresponding similar provisions is believed to be substantially correct, it being understood that the provisions of the Uniform Sales Act are usually more specific.

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<sup>95</sup> See Williston on Sales, § 617.

<sup>96</sup> See footnotes 13, in later article for cases decided under section 74 of the Uniform Sales Act.

<sup>97</sup> A discussion of doubtful cases will be presented in a later article.

<sup>98</sup> See n. 55.



UNIFORM ACT	SALES	CALIFORNIA	MONTANA	NO. DAKOTA	SO. DAKOTA
Sec. 1 and 9	1805	5130	6004	1349	
" 3	1621-22	5014-15	5885-6	1235-6	
" 4 (2)	1740	5090	5962	1310	
" 5	1722 and 1730	5080 and 5085	5951 and 5956	1300 and 1305	
" 6	1140	4632	5535	950	
" 7 (1)	1577 and 1596	4983 and 4997	5854 and 5868	1206 and 1220	
" 9 (2)	1806	5131	6005	1350	
" 9 (4)	1611	5007	5878	1230	
" 12	1763	5103	5973	1322	
" 13 and 14	1772	5112	5982	1331	
" 13	1777	5117	5987	1336	
" 13	1765	5105	5975	1324	
" 15	1764	5104	5974	1323	
" 15 (1) (2)	1771	5111	5981	1330	
" 16 (a)	1766	5106	5976	1325	
" 17 and 18	1140	4632	5535	950	
" 20 (1)	2127, part 2128	5315-16 (part)	6210-11 (part)	1552-53 (part)	
" 21 (2)	1793-94 and -96	5123-24 and -26	5996-97-99	1342-43 and -45	
" 21 (4)	1797	5127	6000	1346	
" 22	1755	5099	5969	1318	
" 26	3440 (part)	6128 (part)	7221 (part)	2369 (part)	
" 27-29	2126-28	5314-16	6209-11	1511-53	
" 42	1784	5119	5989	1338	
" 43 (1)	1754-55	5098-9	5968-9	1317-18	
" 43 (2) (5)	1753	5097	5967	1316	
" 43	1756	5100	5970	1319	
" 43 (4)	1758	5102	5972	1321	
" 46	1757	5101	5971	1320	
" 47	1785	5120	5990	1339	
" 53 and 54	1748	5095	5965	1313	
" 54	3049	5803	6864	2151	
" 53 (2)	3049 and 3076	5803 and 5837	6864 and 6881	2151 and 2163	
" 57	3076	5837	6881	2163	
" 58	3078	5839	6883	2165	
" 59	3079	5840	6884	2166	
" 61 (1), 65	1749	5096	5966	1314	
" 61 (2)	1691	5065	5936	1285	
" 63 (1)	3310	6058	7155	2302	
" 64	3300-01, 3311	6048-49, 6059	7146, 7156	2293, 2303	
" 68	3380, 3384, 3386	6095, 6096, 6098	7191-93	2338-40	
" 69 (6) (7)	3312-14	6060-62	7157-59	2304-06	

Some provisions embody the rules contained in our Code in substantially the same form. Comments on these provisions are for the present purpose obviously unnecessary. The provisions need only be brought together in parallel columns.

UNIFORM ACT	SALES	CALIFORNIA	MONTANA	NO. DAKOTA	SO. DAKOTA
Sec. 1.	1721, 1726-9	5079, 5081-4	5950, 5952-5	1299, 1301-4	
53 (a), 53 (d)	1749	5096	5966	1314	
53 (b) 57	3076	5837	6881	2163	

The provisions which make substantial changes in our Code are very few in number and are considered in a later article. It seems clear that in most cases these changes are not radical but are in accord with common law principles and are usually desirable changes to make on their own merits. *Lauriz Vold.*

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(TO BE CONTINUED)